83-782

No._____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Robert T. Dale,

Petitioner

- vs -

Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Robert T. Dale
Pro Se
54 Phaeton Drive
Penfield, N.Y.14526

QUESTIONS PRESENTED FOR REVIEW

1. Whether a U.S. Appeals Court can claim lack of jurisdiction in a U.S. Tax Court case and thereby ipso facto deny a petitioner all avenues of appeal in a summary judgment decision made by the U.S. Tax Court.

2. Whether or not a summary judgment decision by the U.S. Tax Court Constitutes a "decision" and whether such a decision could effectively result in "dismissal" of the proceedings. (It is obvious that if the decision was in favor of the petitioner, the effect of the summary judgment decision would be to do exactly that, dismiss the proceedings.)

3. Since appeal of a summary judgment decision is allowed in all other civil procedures, whether the denial and

prohibition of all legal avenues of appeal in a summary judgment decision by the U.S. Tax Court constitutes abrogation of due process of law and violation of the Constitution of the United States of America.

4. Since the purpose of the Tax Court proceeding by the IRS is to deprive the petitioner of property, the question is whether or not the petitioner's lack of any avenue of appeal of a U.S. Tax Court decision on a summary judgment motion (at least according to the ruling by the U.S. Appeals Court) constitutes deprivation of property without due process of law.

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(1)If the U.S. Court of Appeals lacks jurisdiction as claimed then the petitioner has no legal avenue of appeal of a decision by the U.S. Tax Court thereby abrogating petitioner's due process right.

(2)The decision by the U.S. Tax Court on a summary judgment motion is clearly not only a "decision" per se but one which could result in

dismissing the proceedings contrary to what the U.S. Appeals Court claims.

(3)If the U.S. Tax Court has ruled in favor of the petitioner, and the IRS appealed (as they indicated in their brief they would) the U.S. Appeals Court could not have ruled they had no jurisdiction on the grounds that the effect of the Tax Court decision was not a "dismissing" of the proceedings, since such a decision would have in fact "dismissed" the proceeding. Thus, the Appeals Court ruling is illegal.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Robert T. Dale, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 25, 1983.

OPINION BELOW

The Court of Appeals for the Second Circuit entered its opinion stating that the denial of the petitioner's motion for summary judgment is "not an appealable decision," and a denial of the summary judgment motion is not a "decision" which would result in "dismissing" the proceeding. A copy of the opinion is attached as Appendix A.

JURISDICTION

On June 25, 1983, the Court of Appeals for the Second Circuit entered its opinion that the Court lacked jurisdiction of a U.S. Tax Court decision on a summary judgment motion. However, the U.S. Appeals Court went even further by stating in its order that a summary judgment decision is not an "appealable decision". Thus, if one reads the U.S.

Court of Appeals decision literally, there is no appeal open to petitioner in any court in the land. Such a ruling contravenes civil law and procedure and represents an abrogation of the Constitutional rights of the petitioner.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law... (emphasis added)

STATEMENT OF THE CASE

The right of the Internal Revenue Service to proceed in this case is voided because of the unquestioned expiration of the statute of limitations in the case. Therefore, a motion for summary judgment was made on this basis by the petitioner in May, 1982. The basis of the summary

judgment motion was provided by the following facts which are not issues of material fact but are matters of public record and are not therefore arguable issues.

(1) Petitioner was declared mentally incompetent by U.S. Federal Court from 1974 to 1978. This is not an "arguable issue of fact that can be challenged by cross-examination," but is a matter of public record.

(2) It was during this same period 1974-78, that each and every statute of limitations extension form was obtained by the Internal Revenue Service.

(3) On at least one occasion in June, 1975, petitioner was coerced by threat and duress into signing a statute of

limitations form while a patient in a mental hospital while receiving heavy medication.

(4) On each occasion when the statute of limitations form was obtained the petitioner resisted angrily and vehemently against signing the forms, but purely because of coercion and duress, in the form of threats of "jeopardy assessment" made by the Internal Revenue Service against the petitioner through lawyer Joseph J. Marcheso and has assistant Morton Schlossberg, the signatures were obtained.

(5) A jeopardy assessment is res ipsa loquitur, a horrible and menacing threat to an unemployed,mentally incompetent person who was at the time

under indictment and at the time needed money to pay for his legal defense. Further, because of petitioner's mental condition, he needed money to support himself, his wife, and new baby which IRS was imperiously threatening to prevent him from doing by means of a "jeopardy assessment" if he did not sign the extension forms.

(6) The right of "jeopardy assessment" in which the IRS threatened to take all earthly possessions from the petitioner between 1974 and 1978 if he did not sign the extension forms is <u>not</u> a "right" of IRS since it is not adjudicated by due process of law. Such a seizure the petitioner now realizes would be unconstitutional. Indeed, as proof of this, when the petitioner finally summoned the

mental strength to resist the IRS threat in 1978 and absolutely refused to sign the extension form, no such jeopardy assessment was made. Therefore, the threats were hollow, false,illegal, and made purely for the purpose of coercing a mentally incompetent person into signing the extension forms.

(7) The present allegation of civil fraud is a ruse to defeat the law of the statute of limitation. The IRS has never made any attempt to determine the petitioner's net worth or cash-on-hand at the beginning of the taxable year 1971, the year in question. Therefore the frivolous claim of civil fraud cannot and should not be used by the IRS for the purpose of evading and defeating the statute of limitations law.

(8) The U.S. Tax Court Judge Randolph Caldwell made a false statement in his "opinion of Special Trial Judge statement" filed June 25,1981. In his opinion Judge Caldwell states, "the notice of deficiency was mailed within six years after filing of the return and the bar of the statute would be lifted." This is a false statement in that it is totally erroneous and is not an issue of material fact as Caldwell claims in his opinion: Publically registered and recorded documents prove that the IRS "Notice of Deficiency" was mailed and dated June 30, 1978. The income tax return was filed by June 15, 1972. Therefore the "Notice of Deficiency" was received at least six years and 15 days after the 1971 tax return was filed which is clearly after the expiration of the

six year statute of limitations. This is not an arguable issue but an unalterable fact established by public record.

REASONS FOR GRANTING THE WRIT

(1) If the U.S. Appeals Court lacks jurisdiction, as it has claimed, then the petitioner has no legal avenue for appeal of a decision by the U.S. Tax Court. In cases too numerous to cite (in fact as a common precedent in all civil law) summary judgment decisions are regularly "appealable" in all other civil procedures. Since the purpose of the Internal Revenue's case in the U.S. Tax Court is not just to tax but to confiscate petitioner's money and property, the denial of an avenue of appeal afforded in other civil procedures is therefore a denial of the constitutional right of due process of law granted to

all American citizens under the Fifth amendment of the Constitution of the United States.

(2) The decision by the U.S. Tax Court on a summary judgment motion is clearly not only a "decision" per se but one which could result in dismissing the proceedings contrary to what the U.S. Court of Appeals stated in its order July 25, 1983. To state that a decision on the summary judgment motion cannot lead to a " dismissing" of the proceeding is so flippant and foolhardy that anyone would find it difficult to believe that educated Appeals Court Judges made such a statement. To wit , the petitioner should not have to "paint a picture": if the summary judgment motion had gone against the IRS in favor of the petitioner obviously this

would have resulted in a dismissing of the proceeding. Therefore the U.S. Tax Court in rendering a summary judgment decision has the capacity to render the "dismissing" of the proceedings contrary to what the judges of the U.S. Court of Appeals for the Second Circuit have stated in their opinion.

(3) If the U.S. Tax Court had ruled in favor of the petitioner and the IRS had appealed the decision (as they imply they would in their Appeal Brief) it would be of great interest as to how the Appeals Court would have ruled in that case. In that case would they have still ruled that they had no jurisdiction when the effect of the U.S. Tax Court decision was to "dismiss" the proceeding? The Constitution requires that

rules of civil procedure be equitably applied to litigants on both sides of the issue.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment of the U.S. Court of Appeals.

Respectfully submitted

Robert T. Dale
54 Phaeton Drive
Penfield, N.Y. 14526

Sworn before me on the 18th day of October, 1983.

Richard L. Hoppe, Notary Public in the State of New York, Monroe County, Commission expires March 30,1985

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of July, one thousand nine hundred and eighty-three.

Present:

Hon. James L. Oakes

Hon. Thomas J. Meskill

Circuit Judges.

Hon. Irving Hill

District Judge*

Robert Dale,

Appellant,

v. 82-4215

Commissioner of Internal Revenue,

Appellee.

ORDER

This appeal is taken pursuant to Internal Revenue Code paragraph 7482(a) 1954 from an order of the United States Tax Court, denying taxpayer Dale's motion for summary judgment. I.R.C. paragraph 7482(a)(1954)provides that the United States Court of Appeals "shall have exclusive jurisdiction to review decisions of the Tax Court." (Emphasis added). A denial of a motion for summary judgment is not a "decision""specifying the amount of (a taxpayer's) deficiency." I.R.C. paragraph 7459(c) (1954) or "dismissing" the proceeding. Id. Thus, the denial of Dale's motion for summary judgment is not an appealable decision. See Michael v. Commissioner, 56 F.2d 825, 826 (2nd Cir. 1932).

Appeal dismissed for lack of jurisdiction.

James L. Oakes

Thomas Meskill

Circuit Judges

Irving Hill

District Judge

N.B. Since this statement does not constitute a formal opinion of this court is is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

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* Of the United States District Court for the Central District of California, sitting by designation.

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were served on attorney George Reynolds of the Internal Revenue Service by U.S. Mail on October 18,1983 at the following address:

600 Arch Street

Philadelphia, PA 19106